RECORD AND BRIEF

No. 15-827

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE COUNCIL OF THE GREAT CITY SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Council of the Great City Schools ("Council") is a coalition of 70 of the nation's largest urban public school systems, [2] and is the only national

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no persons other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

[2] Albuquerque Public Schools; Anchorage School District; Arlington Independent School District; Atlanta Public Schools; Austin Independent School District; Baltimore City Public Schools; Birmingham City Schools; Boston Public Schools; Bridgeport Public Schools; Broward County Public Schools; Buffalo Public Schools; Charleston County School District; Charlotte-Mecklenburg Schools; Chicago Public Schools; Cincinnati Public Schools; Clark County School District; Cleveland Metropolitan School District; Columbus City Schools; Dallas Independent School District; Dayton Public Schools; Denver Public Schools; Des Moines Public Schools; Detroit Public Schools Community District; District of Columbia Public Schools; Duval County Public Schools; El Paso Independent School District; Fort Worth Independent School District; Fresno Unified School District; Guilford County Schools; Hawaii State Department of Education; Hillsborough County School District; Houston Independent School District; Indianapolis Public Schools; Jackson Public Schools; Jefferson County Public Schools; Kansas City Public Schools; Long Beach Unified School District; Los Angeles Unified School District; Metropolitan Nashville Public Schools; Miami-Dade County Public Schools; Milwaukee Public Schools; Minneapolis Public Schools; New Orleans Public Schools; New York City Department of Education; Newark Public Schools; Norfolk Public Schools; Oakland Unified School District; Oklahoma City Public Schools; Omaha Public Schools; Orange County Public Schools; The School District of Palm Beach County; The School District of Philadelphia; Pinellas County Public Schools; Pittsburgh Public Schools; Portland Public Schools; Providence Public School

organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of districts with enrollment greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership, based on urban characteristics. The Council's member districts have a combined enrollment of over 7.3 million students.

Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects. For the past two decades, the Council's legislative and legal staff has participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and the Individuals with Disabilities Education Improvement Act of 2004, as well as development of the attendant regulations promulgated by the Department of Education.

The Council has a strong interest in the outcome of this case, as its member districts implement over

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District; Richmond Public Schools; Rochester City School District; Sacramento City Unified School District; San Antonio Independent School District; San Diego Unified School District; San Francisco Unified School District; Santa Ana Unified School District; Seattle Public Schools; Shelby County Schools (formerly Memphis City Schools); St. Louis Public Schools; St. Paul Public Schools; Toledo Public Schools; Tulsa Public Schools; Wichita Public Schools.

1 million Individualized Educational Programs ("IEPs") on an annual basis. The Council and its members believe it is vitally important to protect the collaborative process through which these IEPs are developed and to promote the educational opportunity and achievement of all students—those with disabilities and those without. Maintaining the Court's workable interpretation of the statutory definition of a "free appropriate public education" ("FAPE") is critical to these goals.

SUMMARY OF ARGUMENT

While Congress has not changed the statutory definition of "free appropriate public education" ("FAPE") in the 34 years since *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), the standard established by the Court continues to be an important part of the national effort to raise expectations and increase educational opportunities for students with disabilities.

By adding new requirements for IEPs, Congress has encouraged school districts to better serve students with disabilities. When reauthorizing IDEA in 1997, for example, Congress added various references to progress in the IEP requirements, including how the child's progress toward meeting annual goals will be measured, when periodic reports on the child's progress will be provided, and a statement of the special education-related services and supplemental aids and services to be used to enable the child to make progress in the general education curriculum. But, IDEA does not establish a private remedy for the failure to ensure any particular

educational outcome or to provide a specific degree of educational benefit for a student with a disability.

Rather, in a series of separate federal laws since *Rowley*, Congress has required states to establish systematic accountability for the educational outcomes of all students, including students with disabilities. As a result of these accountability systems, along with the strengthened IEP requirements from the 1997 and 2004 amendments to IDEA, educational opportunities for students with disabilities are better now than ever. This makes it unnecessary to change the *Rowley* inquiry, which asks whether an IEP, otherwise meeting all the statutory and regulatory requirements, is "reasonably calculated to enable the child to receive educational benefits[.]" 458 U.S. at 207.

The federal courts, moreover, are ill-equipped to ascertain what particular level of educational benefit is appropriate for individual students. Adopting petitioner's unworkable standard, which, contrary to *Rowley*, seeks to define a particular level of educational benefit required for all students with disabilities is unnecessary and ill advised, particularly in the face of the statutory changes that *have* been made by Congress. During the collaborative IEP process, parents and professional educators grapple together with many complex variables designed to ensure educational benefits are provided to students. These discussions take into consideration the nature and degree of each student's disability (or disabilities), the level of each student's prior academic achievement, and each state's distinct educational standards. In addition, these discussions address multiple other domains including

social, emotional, psychological, behavioral, as well as medical and health-related issues. In this context, attempting to determine whether a student would have "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) (or whether the student was likely to make "significant educational progress" (Gov't Br. 7, 9)) would be an overwhelmingly complex and highly subjective judgment. Instead, consistent with Congress's decision in adopting and repeatedly amending IDEA, the courts should continue to guarantee that the increasingly demanding components of IEPs are in place and otherwise defer to professional educators' determinations of the level of educational benefits that one should anticipate for any particular child.

Across all of the circuits, regardless of the adjective used by appellate courts to describe "educational benefits," Council members strive to maximize the educational benefits provided to all students, including those with disabilities, and petitioners' proposed standard would redirect those efforts. Expanding a private remedy for parents of students with disabilities who are unsatisfied with the progress achieved by their children in public schools would undermine the school's role in IDEA's collaborative process. The result would be to increase both litigation and unilateral private placements. Both of these actions would divert significant resources from school districts' efforts to educate other students with disabilities and those without. Such a diversion is particularly problematic given that Congress has never lived up to its promise to fund 40 percent of the extra costs associated with

special education. As a result of this failure, the bulk of special education funding comes from state and local revenues, but those funding levels also have declined. Driving up private placements and encouraging litigation would harm the education of all students.

Litigating over the right amount of educational benefit to be expected for individual students with disabilities is not the best way to improve education. Rather, educators should be accountable for implementing IDEA's complex procedural requirements, including ongoing monitoring, to ensure that a disabled child's progress is adequate. And, they should be accountable for the educational outcomes of *all* students through mandatory state accountability systems.

For these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. The Existing Statutory Framework Appropriately Promotes Educational Opportunities for All Students, Including Students with Disabilities.

This is a statutory-interpretation case. Specifically, the Court is asked again to decide what Congress meant when it required the provision of a FAPE to children with disabilities. 20 U.S.C. § 1412(a)(1)(A). IDEA contains an express definition of FAPE:

> The term "free appropriate public education" means special education and related services that—

> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
>
> (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

Moreover, this Court in *Rowley* has already interpreted Congress's multi-faceted definition of FAPE. That interpretation should control the outcome of this case. There is no reason to revisit *Rowley*, nor any justification for abandoning the Court's cogent statutory analysis.

A. "Free Appropriate Public Education" is a term expressly defined by Congress, and *Rowley* appropriately deferred to that congressional intent.

Faced with a strikingly similar issue and nearly identical request, this Court in *Rowley* declined the invitation to substitute its own definition of FAPE for the one adopted by Congress. The standard offered by petitioner here should fail for the same reasons.

1. In *Rowley*, this Court determined that Congress's express definition of FAPE controls. The student in *Rowley* offered a critique of Congress's definition of FAPE similar to petitioner's here, asserting "that the statutory definition is not 'functional' and thus 'offers judges no guidance in

their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education."'" *Rowley*, 458 U.S. at 187.

Rejecting this argument, the Court described itself as "loath to conclude that Congress failed to offer any assistance" in defining FAPE, especially when Congress explicitly defined the term in question. *Id.* Though the definition may tend "toward the cryptic rather than the comprehensive," "that is scarcely a reason for abandoning the quest for legislative intent." *Id.* at 188; *see also id.* ("Whether or not the definition is a 'functional' one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act."[3]).

The Court accurately described the statutory provision as a "definitional checklist," identifying the procedural items that must be accomplished to provide a FAPE. *Id.* at 189. The Court also confirmed that IDEA as a whole was enacted to improve *access* to education through the adoption of "*procedures* which would result in individualized consideration of and instruction for each child." *Id.* (internal quotation marks and citations omitted).

2. Petitioner's proposed standard here should be rejected for the same reasons as the proposed definition in *Rowley*.[4] As respondent explains in

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[3] This observation from the *Rowley* Court is particularly apt, in light of petitioner's description of the newly minted standard as "eminently workable." Pet. Br. 43.

[4] In fact, it is difficult to decipher any difference between petitioner's articulated standard of "substantially equal opportunity" and "commensurate with the opportunity provided

detail (at 27-37), petitioner's proposed standard ("substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 41 n.8) finds no support in IDEA's text, and certainly none in *Rowley*.

Trying to tie the new proposed standard to *Rowley*, petitioner asserts (at 43) that the articulation of "opportunities to achieve academic success, attain self-sufficiency, and contribute to society" somehow comports with *Rowley*'s statement about "meaningful" access.[5] This unsupported assertion, however, underscores that the use of any adjective or modifier to describe a specific level of educational benefit is inconsequential. No matter whether "some," "substantial," "meaningful," or

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other children," which was the standard rejected in *Rowley*, 458 U.S. at 198-200. The Court was appropriately critical of the word "equal," because it could, in some instances, deprive disabled children of necessary services and, in other instances, require more from districts than IDEA requires. *See id.* at 198-99 ("The theme of the Act is 'free appropriate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services.").

[5] Reliance on *Rowley*'s use of the word "meaningful" is entirely misplaced. Indeed, that word appears only once in the entire majority opinion and, notably, it does not appear in the section of *Rowley* discussing the FAPE definition or standard. Instead, it appears in a discussion of the congressional intent behind IDEA—increasing access to education—in a sentence that explicitly recognizes that Congress *rejected* the imposition of a standard that would require a particular level of educational benefit. *Rowley*, 458 U.S. at 192 ("But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.").

another descriptor is discussed, petitioner fails to establish any difference in actual application. Furthermore, petitioner and the United States spend substantial effort trying to explain why each of their proposed new descriptors for "educational benefit" would best further their interests, even though the *Rowley* Court rejected the use of such a modifier in accordance with IDEA's text.

Instead, the Court prescribed a clear articulation of the test for evaluating an IEP: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures *reasonably calculated* to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 206-07 (emphasis added and footnotes omitted). Petitioner overlooks "reasonably calculated" in favor of trying to inject a subjective adjective before "educational benefits" and, in doing so, inappropriately shifts the inquiry *away* from an IEP team's actions and *onto* a student's educational outcomes.

This Court should reject, for a second time, an attempt to judicially amend Congress's express definition of FAPE.

B. IEPs are created through an interactive process involving students, families, and professionals.

This Court's rejection in *Rowley* of a required level of educational benefit and its refusal to deviate from Congress's express definition of FAPE is also sound from a policy perspective because of IDEA's demanding IEP requirements. As "the centerpiece of the [IDEA's] education delivery system for disabled children," *Honig v. Doe*, 484 U.S. 305, 311 (1988), the

IEP is an interactive, evolving, and detailed process. As the Court recognized in *Rowley*, "[e]ntrusting a child's education to state and local agencies does not leave the child without protection." 458 U.S. at 208.

The "core of [IDEA] . . . is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *see also Rowley*, 458 U.S. at 205-06 (Congress gave "parents and guardians a large measure of participation at every stage of the administrative process"). As the Court stated in *Schaffer*, the "central vehicle for this collaboration is the IEP process," and parents and guardians "play a significant role" in the process. 546 U.S. at 53. From its very outset, for each individual child, the content of an appropriate education is defined collectively in an IEP by a team that includes (among others) the parents and teachers of the student. *See* 20 U.S.C. § 1414(d)(B); *Honig*, 484 U.S. at 311. This process now also takes place in the context of mandated state accountability systems that demand high expectations for students with disabilities, low-income students, as well as students from major racial and ethnic backgrounds. 20 U.S.C. § 6301.

IDEA's collaborative process also is dynamic rather than static. Parents are involved in the ongoing process of evaluating the implementation of the child's educational program and revising IEPs. Whenever parents believe, during a school year, that their child's IEP requires revision because of, for example, "any lack of expected progress" (based on periodic formal progress reports or other information) or "the child's anticipated needs," they may request that the IEP team convene and review the IEP and

consider revising it to meet the child's needs. 20 U.S.C. § 1414(d)(4)(A). Or the parents and the school district may agree to develop a written document amending the IEP during the school year without convening an IEP meeting. 20 U.S.C. § 1414(d)(3)(D). And at a minimum, the whole IEP team is required to meet at least annually, including the parents, formally reviewing whether the plan's goals are being achieved and revising the IEP as needed. 20 U.S.C. § 1414(d)(4)(A). The team also considers the results of reevaluations of the child and other new information about the child and his or her needs, including any such information submitted by the parents. 20 U.S.C. § 1414(d)(3)-(4).

IDEA's emphasis on prompt cooperative solutions imposes obligations on school districts and parents alike to ensure their good-faith commitment to a truly collaborative process. Indeed, school districts frequently agree to private placements where they are unable to provide an appropriate educational program themselves. *See* 20 U.S.C. § 1412(a)(10)(B); *see also infra* Section III.B. (discussing private placement cost). School districts voluntarily expend hundreds of millions of dollars in state and local revenue on agreed private placements, which occur when the collaborative process established by the Act is operating as it is intended.

C. Congress has strengthened the requirements for IEPs, thereby demanding higher expectations for students with disabilities in the 34 years since *Rowley*.

Petitioner points to several of IDEA's provisions concerning IEPs and acknowledges that these have

been amended to advance some of the same goals behind petitioner's proposed new definition of FAPE. *See, e.g.*, Pet. Br. 37-38, 42-43. These amendments, however, do not suggest that Congress expects the Court to change the definition of FAPE, but rather they indicate congressional intent to improve educational outcomes for students with disabilities through legislative enhancements to the IEP process. For example, when Congress reauthorized IDEA in 1997, it required the IEP to include provisions for measuring the student's progress toward annual goals, for establishing periodic progress reports, and for discussing the services to be used to assist the student with functioning in the general education curriculum. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 614, 111 Stat. 81 (1997) (codified at 20 U.S.C. § 1414). These amendments have allowed Congress to improve educational opportunities without creating the negative consequences risked by petitioner's approach (discussed *infra* Section III).

Moreover, it is undisputed that Congress repeatedly has chosen *not* to amend the actual definition of FAPE contained in IDEA when it made these other changes. Petitioner is thus wrong as a matter of statutory interpretation: "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also Kucana v. Holder*, 558 U.S. 233, 249 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original)).

Judicial amendment of an express statutory definition is improper, especially when Congress amended several provisions of the same statute but chose to retain its original definition of the term at issue. Moreover, it is especially unnecessary here, since Congress has purposely used other amendments to the same statute to improve opportunities for students with disabilities.

D. Federal statutes, adopted since *Rowley*, require states and school districts to be accountable for the academic progress of all students, including students with disabilities.

In addition to strengthening the IEP process for students with disabilities, Congress has also raised the level of accountability that states and school districts have for the educational outcomes of all students. Congress accomplished this, not through changes in IDEA, but rather through a dramatic restructuring of the Elementary and Secondary Education Act ("ESEA"), the principal federal education program designed to improve the academic achievement of disadvantaged students. As the Court noted in *Rowley*, 458 U.S. at 179-80, it was through ESEA that Congress initially sought to address the needs of students with disabilities, before replacing a grant program under that statute with the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175, Part B, and ultimately IDEA. Again, in 2001, Congress sought to bolster educational opportunities provided under IDEA by new amendments to ESEA.

When ESEA was reauthorized through the No Child Left Behind Act of 2001 ("NCLB"), Congress mandated that states develop and implement accountability systems that included high standards for all students and annual assessments. Pub. L. No. 107-110, 115 Stat. 1425 (2002). Under NCLB, state accountability systems had to annually analyze progress for all students, but also for specified subgroups, including students with disabilities. *Id.* at 115 Stat. 1446. NCLB required that 95% of students be included in yearly assessments. *Id.* at 115 Stat. 1448. Moreover, students with disabilities had to be assessed using the same tests as other students, except for the 1% of students with the most significant cognitive disabilities for whom an alternate assessment could be used. 34 C.F.R. 200.13(c)(2). By requiring the same educational outcome expectations for all students, NCLB demanded that educators hold high expectations for students with disabilities.

In 2015, Congress amended the NCLB, reauthorizing ESEA through the Every Student Succeeds Act ("ESSA"). 20 U.S.C. § 6301. While ESSA made a number of changes to NCLB, principally shifting authority in several areas back to the states, it also maintained the key requirements that states have accountability systems that include annual testing, assess 95% of students, use the same assessments for students with disabilities, permit only 1% of students with the most significant cognitive disabilities to participate in alternate assessments (absent a federally approved state waiver), and report disaggregated data for subgroups, including students with disabilities. 20 U.S.C. § 6311(c)(4)(E)(ii)(I); 20 U.S.C. § 6311(b)(2)(B)(xi)(II);

see also 34 C.F.R. 200.104(b)(3) (promulgating the most recent regulations implementing ESSA's statutory directives).

Congress rejected the idea of setting a specific benefit or defining national educational standards for individual students, including students with disabilities, as the above provisions continue to ensure that educational-outcome expectations for all students must remain high.

Moreover, the *state* educational outcome standards required by NCLB and ESSA do not provide guarantees to individual students. Rather, they are used to direct state and federal resources toward the improvement of lower performing schools. As a result, the remedies available under both NCLB and ESSA are quite different than the private placements allowed under IDEA for a denial of FAPE. First, the remedies are systemic and not private. *See* 20 U.S.C. § 6573(a)(2). Unlike IDEA, NCLB and ESSA provide no private right of action. *See, e.g.*, *Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209-14 (3d Cir. 2008) (holding there is no private right of action under NCLB). Second, the remedies are designed to improve the public education offered to all students, rather than to provide an individual student with educational opportunities in a private-school setting. *Id.* The essential aim of both NCLB and ESSA is to require states and school districts to take action to improve the educational opportunities provided at schools where the educational outcomes of all students or students in particular subgroups (like students with disabilities) need improvement.

Thus, above and beyond the requirements of IDEA, these other federal laws require high expectations and enhanced services for all low performing students, including those with disabilities. Under NCLB in 2002 and now ESSA in 2015, state accountability systems shine a light on schools and programs that are successfully educating all students, but also reveal places where targeted interventions are needed and achievement must be improved.

II. Federal Courts Are Ill-Equipped to Second Guess the Complex Educational Judgments Made Through the IEP Process.

Education professionals are best situated to facilitate the complex collaborative process required to develop and refine effective IEPs.

A. The nature and degree of educational progress to be expected is highly variable because of differences among students, variations in state educational standards, and the number of relevant domains required to be evaluated.

The process of developing an IEP is by definition highly individualized and also complex. Therefore, it is not feasible for courts to quantify the precise amount of educational benefit or outcome that should be expected of every student.

First, every student is different, as is every student that is entitled to special education services. The nature and severity of each student's disability varies greatly. As this Court acknowledged, IDEA requires states and school districts "to educate a wide spectrum of . . . children, from the marginally

hearing-impaired" to students with severe cognitive impairments. *Rowley*, 458 U.S. at 202. The reasonable expectations for a student with a moderate disability may be dramatically different than those for a student with a more profound condition. As the Court noted, the "benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between." *Id.* For some students with disabilities, it is reasonable to expect their academic progress will match or outpace their non-disabled peers. *Id.* at 185 (where a deaf child performed better than the average child in her class and was advancing easily from grade to grade). For others, great progress may entail accomplishing far more simple tasks, including "even the most simple self-maintenance skills." *Id.* at 202. Moreover, many students have multiple disabilities that affect their progress in differing ways. All of these factors are taken into account in the development of an IEP, and they make it impossible to establish a uniform, judicially-enforceable standard of required progress.

Students' progress is also monitored across multiple domains. The educational benefits provided under IDEA are not purely academic. To the contrary, IEP teams evaluate not just academic outcomes, but social, emotional, psychological, behavioral, medical, and health-related progress as well. Students may make great progress in some domains, while occasionally regressing in others. In some circumstances, improvements in non-academic areas form the foundation for future academic progress. The fact that school districts provide

educational benefits across a broad range of needs makes it even more difficult to define the level of "educational benefits" required. Indeed, the educational benefits provided under IDEA span many domains and are measured in many different ways. And, for some students, a "reasonably calculated" IEP may legitimately contemplate different levels of progress in different areas.

Even in the realm of purely academic progress, it would not be a simple matter for federal courts to assess the adequacy of the educational benefits provided. For example, every state has its own distinct academic standards. Different states also use different assessments. IEP teams, collaboratively with parents, determine the individual participation in alternate achievement standards and alternate assessments. Moreover, statewide standards and assessments are frequently changed. Indeed, since November 2014, at least 15 states have changed their assessment systems. *See* Julie Rowland Woods, *State Summative Assessments: 2015-16 school year*, Education Commission of the States, November 2015, *available at* http://www.ecs.org/ec-content/uploads/12141.pdf; *see also* Tonette Salazar, *50 Ways to Test: A look at state summative assessments in 2014-15*, Education Commission of The States, November 2014, *available at* http://www.ecs.org/clearinghouse/01/16/06/11606.pdf. Professional educators and parents are far more familiar with state and local standards and assessments and are better positioned to evaluate together a student's progress on an annual, or even more frequent, basis.

B. This court should follow its long history of deferring to educators' professional judgment.

Because of the extensive protections built into the IEP process and the complexity of educating students with disabilities, this Court in *Rowley* appropriately held that courts should defer to the judgment of professional educators about the degree of educational benefit that must be provided under IDEA. *Rowley*, 458 U.S. at 206 ("[T]he provision that a reviewing court base its decision on the 'preponderance of the evidence' is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.").

The Court has repeatedly "cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'" *Id.* at 208 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 42).[6] The precise degree of educational benefits

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[6] The Court has recognized that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Wood v. Strickland*, 420 U.S. 308, 326 (1975) ("It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."); *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971) ("School authorities are traditionally charged with broad power to formulate and implement educational policy . . . ."); *Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint."); *see also Fisher v. Univ. of Texas at Austin*, 579 U.S. ____, 136 S. Ct. 2198, 2208 (2016) ("Once,

across multiple domains that is to be expected for individual students with a variety of disabilities operating under numerous shifting state education standards is clearly one such question.

III. Petitioner's Proposed Standard Is Not Only Inconsistent with Congress's Express Intent, But It Also Would Be Harmful to Students.

The Council, like all parties involved in this case, desires a result that provides the best possible outcomes for education of all students. Petitioner seeks that result by proposing a judicial amendment to a statutory definition that petitioner believes will alter litigation outcomes. The Council strongly believes, however, that educational outcomes for all students are best protected through the broad-based procedural and systematic protections found in the several federal statutes discussed above.

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however, a university gives a reasoned, principled explanation for its decision, deference must be given to the University's conclusion, based on its experience and expertise . . . ." (internal quotations and citations omitted)); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 707 (2010) (explaining that the Court was "[d]eferring broadly to the law school's judgment about the permissible limits of student debate."); *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003) ("The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise.").

A. Petitioner proposes an unworkable standard that would require a subjective evaluation of educational outcomes.

Petitioner purports to accept the *Rowley* prohibition on reading an educational outcome guarantee into the definition of FAPE, Pet. Br. 49-50, yet the operational application of petitioner's proposed standard effectively mandates an impracticable inquiry into the specific educational outcomes expected of each student with a disability. The United States, in support of petitioners, even more blatantly proposes a standard that would require "significant educational progress" for students with disabilities. Gov't Br. at 7, 9.

The standards proposed by both petitioner and the United States would effectively require an unworkable judicial inquiry into whether every student with an IEP is making sufficient academic progress compared to his or her non-disabled peers. Indeed, petitioner discusses the level at which students with disabilities should be achieving, and highlights that a recent guidance document from the U.S. Department of Education encourages an "emphasis on grade-level achievement." *See* Pet. Br. 45-47.[7] Thus, despite petitioner's stated position of avoiding an analysis of educational outcomes, the practical application of either the standard proposed

[7] As discussed above, the Court in *Rowley* expressly rejected grade level achievement as a workable standard for all students with disabilities. *See supra* at 18.

by the United States or that proposed by petitioner would require such scrutiny.[8]

This Court's rejection of a very similar standard in *Rowley* also illustrates that petitioner's proposed standard would require such an unworkable analysis. As discussed, *supra* at 8 n.4, "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8) is strikingly similar to "commensurate with the opportunity provided other children." *Rowley*, 458 U.S. at 198. *Rowley* rejected that standard as unworkable. Petitioner's proposed standard here similarly would upend the IEP process and create an untenable situation for the educational professionals trying to develop appropriate strategies to help their students in the best ways possible.

B. Petitioner's standard would increase litigation and result in increased private placements, both of which are expensive.

Petitioner attempts to take a standard that this Court described as a "procedural checklist" and inject into it a subjective term, "substantially equal," thereby requiring a detailed analysis of the level of educational benefits in several areas that would be required for all students with disabilities. Such a standard invites litigation. Parents would now be told that they have a potential judicial remedy if they do not believe their child's IEP will provide him or her "with substantially equal opportunities to

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[8] As discussed *supra*, the *Rowley* Court was particularly critical of the word "equal" with respect to IEPs, making petitioner's recent decision to propose this standard even more curious. *Rowley*, 458 U.S. at 198-99.

achieve academic success, attain self-sufficiency and contribute to society." Pet. Br. 14. It is difficult to see how a court (or administrative law judge) will be able to efficiently adjudicate such claims, because petitioner's standard is highly subjective and complex. How is a court to define "substantially" or measure the opportunity for achieving academic success, self-sufficiency, or societal contribution?

The resulting likelihood of increased litigation and the likelihood of more protracted litigation are problematic. First, of course, such litigation imposes direct financial burdens on school districts. The dollars that districts must dedicate to litigation are dollars that could otherwise be used to provide additional services to all students, including the students with IEPs. Second, a dramatic increase in litigation risk has the corollary detriment of increased insurance premiums. Once again, no matter whether the financial costs are direct or indirect, increased litigation costs deplete the limited budgets through which districts provide services to all students. This is particularly unfortunate when there are other safeguards already in place that do a superior job protecting the rights of students with disabilities.

Moreover, in the event parents unilaterally elect to place their child in a private school at their own expense, the parents are entitled to reimbursement if the public school district is unable to provide a FAPE and the private school can provide an appropriate education. 20 U.S.C. § 1412(a)(10)(C). Thus, altering the definition of FAPE has a dramatic impact on the funds a district must expend to cover private education. Educational services provided to students with disabilities in a private setting cost a public

school district, on average, nearly five times what it costs to provide the services within-district. Jay G. Chambers et al., *What Are We Spending on Special Education Services in the United States, 1999-2000*, at 12 (updated June 2004), *available at* http://www.csef-air.org/publications/seep/national/advrpt1.pdf. Indeed, the most comprehensive study on this topic found that—in the year 2000—"special education spending on a school-aged student served in programs outside the public schools amounted to $26,440," including the cost of tuition. *Ibid.* "In contrast, special education spending on direct instruction and related services for school-aged students served within public schools amounted to $5,709 per pupil." *Ibid.*

Internal survey data from Council members for school year 2015-16 reflect even higher costs for private school placements. In the Los Angeles Unified School District, the second-largest school system in the nation with an enrollment of 557,632 students, the average per student annual cost for day program placements is $29,663. For the Chicago Public Schools, with 381,349 students, the average per student cost for such placements was even higher at $44,106. Comparatively, for Providence Public Schools, a smaller urban school district of 23,867 students, the average per student annual cost for day program placements is $41,371. And, the Anchorage School District, with a student population of 47,207, has a per-student annual cost for day program placements of $67,806. Despite vast differences in student enrollment, the highest out-of-district day program cost was $73,354 for Providence, $75,182 for Los Angeles, and $87,326 for Chicago.

The annual total cost of these placements is substantial. For example, this annual aggregate expenditure was $12.3 million in Providence and $93.4 million in Los Angeles. Out-of-district placements thus have a staggering financial impact on urban school systems across the country.

In part as a result of such placements, the total cost of special education constitutes a large portion of the overall budgets of urban public schools. For example, special education costs account for 18.5%, or $98.2 million, of the total annual operating budget in Des Moines Public Schools, 20.0%, or $1.5 billion, in Los Angeles, and 25.5%, or $568.2 million, in the Clark County School District (Las Vegas).

With approximately 13% of students nationwide served pursuant to IEPs, the costs associated with the dramatic change in the definition of FAPE proposed by petitioner would likely be astronomical. *See* National Center for Education Statistics, Children and Youth with Disabilities (last updated May 2016), http://nces.ed.gov/programs/coe/indicator_cgg.asp.

Increased unilateral private placements can be problematic for other reasons as well. For example, when students are placed in private institutions offering services to only students with disabilities, or to only students with a particular disability, such a placement may be in tension with Congress's explicit goal in IDEA to educate students with disabilities with their non-disabled peers in the least restrictive environment. *See* 20 U.S.C. § 1412(a)(5). *See also C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008) ("It is common ground that the IDEA manifests a preference for

mainstreaming disabled children."); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) (IDEA's "strong preference" that students with disabilities be educated in their least restrictive environment "gives rise to a presumption in favor of . . . placement in the public schools"). In some private placements, mainstreaming is simply not possible.

Once again, all of this cost risk and educational risk is unnecessary, because other forms of federal and state oversight regulate educational outcomes for all students. *See supra* Section I.D.

C. Petitioner's desired changes to the definition of FAPE come at a time when public education budgets are being severely cut, and IDEA has never been fully funded.

Petitioner's proposed change also comes at a time when districts across the nation face crippling budget cuts. Ever since the 2008 recession, public school districts have been under extraordinary pressure. In fact, "[a]t least 31 states provided less state funding per student in the 2014 school year . . . than in the 2008 school year." Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, Center on Budget & Policy Priorities, at 1 (Jan. 25, 2016), *available at* http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf. Local government funding of public education fell over the same period. As of 2016, at least 25 states are still providing less "general" or "formula" funding (which is the primary source of state school funding) per student than in 2008. *Id.* "In seven states, the cuts exceed 10 percent." *Id.*

Petitioner's proposed standard is a financial load that public school district budgets simply cannot bear. As discussed above, it is telling that Congress never sought to amend the definition of FAPE to make private remedies more broadly available but instead enhanced IDEA's procedural requirements and safeguards for individual students and created systemic remedies under ESSA. It is also notable that this purposeful congressional *in*action on the FAPE definition coincides with Congress's decision not to fund IDEA at the intended level. Indeed, the statute calls for the federal government to fund up to 40% of the differential that public school districts incur providing services to students with disabilities. 20 U.S.C. § 1411(a)(2)(A)-(B). Congress has never funded that full amount, currently funding approximately 17% of the differential. Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. Nat'l Ass'n Admin. L. Judiciary 423, 448 (2012).

If Congress wishes to change the definition of FAPE in a way that dramatically increases the cost of special education, it will face significant public pressure to raise federal funding levels as well. Similarly, the Court, without the ability to increase such funding, should not adopt a costly definitional change that Congress has not.

D. The Court should allow educators to maintain their focus on efforts for student success, not on the avoidance of litigation.

IEPs are created through an interactive process among, *inter alia*, educators, parents, students, and health-care providers. Every one of these constitu-

ents is doing his or her best to improve the performance and opportunities for students with disabilities. Petitioner has not provided any evidence supporting the notion that individual educators—those developing IEP plans—aim to provide inferior outcomes to their students based on the circuit court jurisdiction in which they live. In fact, as respondent points out, there is no credible evidence that outcomes even vary between jurisdictions that allegedly apply different judicial standards. *See* Br. in Opp. 12-16.

What petitioner now proposes is to take Congress's enhanced procedural requirements and safeguards—something educators can readily apply—and turn them into an unworkable measure of whether they are providing "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society" (Pet. Br. 41 n.8). As petitioner cannot provide an explanation as to how this term would be applied in litigation, it is unwise to force it upon educators.

A litigation remedy is not the solution to the "problems" petitioner perceives. Congress has never seen fit to change the definition of FAPE, and the Courts should not intervene to do so. *Rowley* provides cogent guidance on how to apply Congress's express language, and the Court should not waiver from *Rowley*. Educators should be allowed to preserve their primary mission of delivering educational services to all students rather than being diverted to implement the petitioner's new judicially created legal standard for a FAPE.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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